IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CIVIL DIVISION

CASE NO.: CACE18-016496

KM1 and KM2, minor children and
their adoptive parents and guardians,
TM and MM,

Plaintiffs,

v.

CHILDNET, INC., NATIONAL
YOUTH ADVOCATE PROGRAMS,
INC. and KIDS IN DISTRESS, INC.

Defendants.
_____/

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT, CHILDNET, INC.'S MOTION TO DISMISS COUNTS III, IV, AND V OF PLAINTIFFS' FIRST AMENDED COMPLAINT

The Plaintiffs, KM1 and KM2, minor children and their adoptive parents and guardians, TM and MM, by and through the undersigned counsel, and hereby file this Response in Opposition to Defendant, CHILDNET, INC.'s (hereinafter "CHILDNET"), Motion to Dismiss Count III, IV, and V of Plaintiffs' First Amended Complaint, and in support thereof state as follows:

1. On or about February 25, 2019, Plaintiffs First Amended Complaint was deemed as filed by this Court's order.

2. In their First Amended Complaint, Plaintiff KM1, the more recently adopted son, alleges a claim against CHILDNET for Negligence (Count I), and KM2, the daughter who previously was adopted and then sexually abused by KM1, alleges a claim against CHILDNET

for Negligence (Count II), These counts raised by the plaintiff children have been answered and are not the subject of CHILDNET's Motion to Dismiss.

3. In their First Amended Complaint, Plaintiffs TM and MM, the adoptive parents, allege claims against CHILDNET for Wrongful Adoption based on Negligent Misrepresentation and Concealment (Count III) and Wrongful Adoption based on Section 63.085, Florida Statutes, and all four Plaintiffs, KM1, KM2, MM, and TM allege claims against CHILDNET for Culpable Negligence (Count IV).

4. On April 28, 2017, Plaintiffs TM and MM adopted Plaintiff KM1 after being selected and matched as the appropriate family for such adoption by Defendant CHILDNET. *See* Pl.'s 1st Am. Compl. ¶ 7, 65.

5. TM and MM's adoption of KM1 occurred after Defendant CHILDNET had been providing foster care and related services, including case management and adoption services, to KM1 since April 10, 2015. *See* Pl.'s 1st Am. Compl. ¶ 17.

6. TM and MM adopted KM1 relying upon CHILDNET's disclosures and assurances that KM1 was an appropriate match for their family and that he had no maladaptive or sexually aggressive behaviors. *See* Pl.'s 1st Am. Compl. ¶¶ 63, 65, 69, 74, 75, 76, 77, 78, 80, 81, 82, 94.

7. However, CHILDNET was aware that KM1 exhibited the following concerning behaviors in a prior foster home, which were not disclosed to TM and MM prior to their adoption of KM1:

a. "Exposing his penis in public;"

b. "Playing with his penis;"

c. "Taking off his clothes in public and throwing a tantrum when redirected to put his clothes back on;"

d. "Defecating on himself and hiding feces around the foster home;"

e. "Smearing feces on his face;"

f. "Urinating on himself, the foster home, and schoolmates;"

g. "Hitting his head when angry;"

h. "Lying;"

i. "Rubbing his hands on his buttocks;"

j. "Putting his finger up his butt;"

k. "Not wanting to bathe;"

l. "Hitting, kicking, and spitting on other children and the foster mother;" and

m. "Using curse words."

Pl.'s 1st Am. Compl. ¶¶ 24(a)-(m).

8. Additionally, CHILDNET reassured TM and MM that the following behaviors of KM1 were normal when TM and MM brought such behaviors to CHILDNET's attention before the adoption of KM1 was finalized:

a. "That KM1 talked about body parts and sexuality that seemed inappropriate for his age of only four years old;"

b. "That KM1 would attempt to watch TM and MM change clothes, go to the bathroom, and shower, and that KM1 would throw a tantrum when redirected from these behaviors;"

c. "That KM1 thought it was okay to grab TM and MM's crotch, laughed when he did, and seemed to think that was an appropriate action when redirected that it was inappropriate behavior by TM and MM;"

d. "That KM1 was getting erections every time TM and MM undressed him to change his clothes or gave him a bath;"

e. "That KM1 had been engaging in violent behavior toward TM and MM, including hitting, biting, and screaming;" and

f. "That KM1 was afraid of the shower and terrified of getting his face and head wet, and that it took weeks for TM and MM to get KM1 comfortable with getting his face and head wet."

See Pl.'s 1st Am. Compl. ¶¶ 73(a)-(f), 74.

9. Further, CHILDNET was aware that KM1 disclosed information suggesting he had engaged in child-on-child sexual behavior in one of his foster homes, yet CHILDNET failed to obtain a psychosexual evaluation for KM1 or ensure he received appropriate therapy to address such sexualized behavior; nor did CHILDNET advise TM and MM that KM1 needed such services and the risk such behaviors posed to TM and MM's four-year-old child, KM2. *See* Pl.'s 1st Am. Compl. ¶¶ 54, 55, 75.

10. Significantly, CHILDNET wrote a Child Study concerning KM1, which was provided to TM and MM, "that falsely stated that he 'does not display any maladaptive behaviors' and failed to note any of the negative behaviors KM1 exhibited during this time in foster care including his sexualized behaviors or that due to such behaviors his prior foster parent in the Williams foster home had asked for him to be removed from her home." *See* Pl.'s 1st Am. Comp. ¶¶ 69, 80.

11. In reliance of the representations made by CHILDNET concerning KM1, TM and MM proceeded to finalize their adoption of KM1 on April 28, 2017, and only a few months later, on July 4, 2017, "MM found KM1 and KM2 naked with KM1 on top of KM2 playing the 'private

parts game, . . ." This incident has caused Plaintiffs to suffer psychological conditions, trauma, and expenses related to necessary treatment and supervision of KM1 and KM2. *See* Pl.'s 1st Am. Compl. ¶¶ 94, 97, 103, 105.

12. On or about March 15, 2019, CHILDNET filed a Motion to Dismiss Counts III, IV, and V of Plaintiffs' First Amended Complaint.

13. CHILDNET's Motion to Dismiss should be denied for the following reasons:

a. In regard to Count III for Wrongful Adoption based on Negligent Misrepresentation, CHILDNET argues that it could not disclose anything to TM and MM regarding the child-on-child incident involving KM1 or his behaviors because section 63.085, Florida Statutes prohibits disclosure of confidential information. However, this is an inaccurate reading and interpretation of the statute, which requires that "the adoption entity must provide the prospective adoptive parents with information concerning the background of the child to the extent such information is disclosed to the adoption entity" and only requires that "the adoption entity must redact any confidential identifying information." Therefore, as Plaintiffs have alleged, CHILDNET was responsible for disclosing the substantive background information regarding KM1's prior concerning behaviors to TM and MM and CHILDNET failed to do so in this case. Further in regard to Count III for Wrongful Adoption based on Negligent Misrepresentation, CHILDNET argues that because TM and MM, as concerned prospective adoptive parents, alerted CHILDNET to some of KM1's behaviors prior to finalization of his adoption, that CHILDNET was relieved of its statutory,

regulatory, and contractual obligations to provide full disclosure of KM1's background to TM and MM and to provide required adoptive services, such as appropriate pre-adoptive assessments and evaluations to KM1. Plaintiffs have clearly alleged that CHILDNET's misrepresentations were reassuring TM and MM that the behaviors of KM1 were normal and they did not need to be concerned and that they relied on such representations in proceeding to adopt KM1. *See* Pl.'s 1st Am. Comp. ¶¶ 92, 93, 94, 116(f), and 116(g).

b. In regard to Count IV for Wrongful Adoption based on Section 65.085, Florida Statutes, CHILDNET argues the claim should be dismissed because the statute does not provide for a private cause of action. However, the statute creates specific statutory duties owed by CHILDNET to Plaintiffs TM and MM regarding disclosures concerning KM1. In addition to CHILDNET's statutory duties, Plaintiffs have adequately alleged CHILDNET's breach of such duties, which resulted in injuries and damages to Plaintiffs; therefore, Plaintiffs have adequately stated a cause of action for negligence regarding CHILDNET's violation of the statute.

c. In regard to Count V for Culpable Negligence, CHILDNET argues that Plaintiffs allegations do not meet the culpable negligence standard in manslaughter, punitive damages, and worker's compensation cases; however, there is no need to go to these other areas of law to define "culpable negligence" when section 409.993 Florida Statutes, which governs lead community-based care providers such as CHILDNET, defines the phrase "in a culpably negligent manner" as "reckless indifference or

grossly careless disregard for human life," and while there is no opinion from the state courts in Florida directly addressing the statutory caps on damages or culpable negligence pursuant to section 409.993, Florida Statutes, there is case law from the United States District Court for the Middle District of Florida interpreting the statute in Plaintiffs' favor.

MEMORANDUM OF LAW

I. Legal Standard for Motion to Dismiss

A motion to dismiss requests the "trial court to determine whether the complaint properly states a cause of action upon which relief can be granted, and if it does not, enter an order of dismissal." *Nero v. Continental County Club R.O., Inc.*, 979 So. 2d 263, 267 (Fla. 5th DCA 2007). It is well settled in Florida that in order to withstand a motion to dismiss, the complaint need only state "ultimate facts sufficient to indicate the existence of a cause of action." *Greenwald v. Triple D Properties, Inc.*, 424 So. 2d 185 (Fla. 4th DCA 1983); *see also* Fla. R. Civ. P. 1.110(b)(2) ("pleading which sets forth a claim for relief must state a cause of action and shall contain a short and plain statement of the ultimate facts showing that the pleader is entitled to relief").

When considering a motion to dismiss, the trial court "must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations." *Sobi v. Fairfield Resorts, Inc.*, 846 So. 2d 1204, 1206 (Fla. 5th DCA 2003) (citations omitted). "It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them. Thus, '[t]he question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to relief requested.'" *Id.* (citing *Cintron v. Osmose Wood Preserving, Inc.*, 681 So. 2d 859, 860–61 (Fla. 5th DCA 1996). A "dismissal should be granted only when it has been conclusively

demonstrated that plaintiff can prove no set of facts whatsoever in support of the cause of action." *Jiminez v. Community Asphalt Corp.*, 968 So. 2d 668, 670 (Fla. 4th DCA 2007). In the instant case, viewing all allegations in the light most favorable to the Plaintiffs, CHILDNET's Motion to Dismiss should be denied.

II. Plaintiffs TM and MM have sufficiently stated a claim for Wrongful Adoption based on Negligent Misrepresentation and Concealment against CHILDNET; therefore, Count III of Plaintiffs' First Amended Complaint should not be dismissed.

A cause of action for negligent misrepresentation requires a plaintiff to allege the following:

> ". . . (1) misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the representation without knowledge as to its truth or falsity, or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend that the representation induce another to act on it; (4) injury must result to the party acting in justifiable reliance on the misrepresentation."

Wallerstein v. Hosp. Corp. of America, 573 So. 2d 9, 10 (Fla. 4th DCA 1990)(per curiam)(quoting *Atlantic Nat'l Bank of Florida v. Vest,* 480 So.2d 1328, 1331 (Fla. 2d DCA 1985).

> Although the *Atlantic Nat'l Bank* case sets out definite elements to state a cause of action for negligent misrepresentation, case law reveals a rather "loose" construction. The tort is often mentioned and rarely explained. All that must be alleged in a suit for negligent misrepresentation is not that the representor intended to make a false statement, but rather that the representation was made under circumstances in which its falsity should have been known.

Wallerstein, 573 So. 2d at 10.

TM and MM allege CHILDNET was aware of many concerning behaviors of KM1 yet failed to disclose such behaviors to TM and MM prior to their adoption of KM1, and instead, CHILDNET reassured and represented to them that all KM1's behaviors were normal. Count III of Plaintiffs' First Amended Complaint specifically pleads the following:

a. CHILDNET was aware of the behaviors of KM1 and that they posed a foreseeable risk of harm to KM2 and inappropriately matched KM1 with TM and MM for adoption when Defendant knew that KM2 was another young child living in TM and MM's home;

b. Although CHILDNET was aware that KM1 had many concerning behaviors during his time in foster care that were signs he was sexually abused, CHILDNET failed to obtain a psychosexual evaluation of KM1 prior to placing KM1 in TM and MM's home and prior to finalizing the adoption of KM1 by TM and MM;

c. Although CHILDNET was aware that KM1 had many concerning behaviors during his time in foster care that were signs that he may have mental health problems, CHILDNET failed to obtain a psychological evaluation prior to placing KM1 in TM and MM's home and prior to finalizing the adoption of KM1 by TM and MM;

d. CHILDNET failed to disclose all known behaviors and all known history regarding KM1 to TM and MM prior to placing KM1 in their home and prior to finalizing the adoption of KM1 by TM and MM;

e. CHILDNET was aware of the behaviors of KM1 and that they posed a foreseeable risk of harm to KM2, yet they placed KM1 in TM and MM's home and finalized the adoption of KM1 by TM and MM without implementing a safety plan to protect KM2;

f. Upon TM and MM raising concerns regarding KM1's behaviors in their home and whether he was receiving appropriate therapeutic services to address his behaviors, CHILDNET failed to obtain appropriate therapeutic services for KM1 and misleadingly represented and reassured TM and MM that KM1's behavior was normal and they should not be worried about him; and

g. Prior to their adoption of KM1, CHILDNET provided TM and MM with a misleading Child Study of KM1 that misrepresented his history of concerning behaviors by stating that he had no maladaptive behaviors, when, in fact, Defendant was well aware of many maladaptive behaviors exhibited by KM1 during his time in foster care.

Pl.'s 1st Am. Compl. ¶¶ 116(a)-(g); *see also* Pl.'s 1st Am. Compl. ¶¶ 24(a)-(m), 73(a)-(f), 75, (quoted and described hereinabove and showing knowledge on the part of CHILDNET of KM1's background and concerning behaviors). Further, Plaintiffs TM and MM allege they "reasonably relied upon any and all statements and representations made by Defendant, CHILDNET,

concerning KM1 prior to KM1 being placed in [their] home and prior to the finalization of KM1's adoption by TM and MM." Pl.'s 1st Am. Compl. ¶ 117. Lastly, Plaintiffs alleged they suffered damages as a result and proximate cause of CHILDNET's misrepresentations. Pl.'s Am. Compl. ¶ 118. Therefore, Plaintiffs have adequately stated a claim of negligent misrepresentation against CHILDNET.

CHILDNET's first argument for dismissal of Count III, which is that it has no liability in this case because it cannot disclose confidential information regarding adoptive children to prospective adoptive parents, is inaccurate and focuses on only one source of CHILDNET's duties concerning adoption disclosures. Chapter 63, Florida Statutes states the following regarding required disclosures that must be made to adoptive parents:

> 63.039 Duty of adoption entity to prospective adoptive parents; sanctions.—
>
> (1) **An adoption entity[1] placing a minor for adoption has an affirmative duty to follow the requirements of this chapter and specifically the following provisions**, which protect and promote the well-being of persons being adopted and their parents and prospective adoptive parents by promoting certainty, finality, and permanency for such persons. The adoption entity must:
>
> (a) Provide written initial disclosure to the prospective adoptive parent at the time and in the manner required under s. 63.085. . .

Fla. Stat. § 63.039(1)(a)-(b)(2017)(emphasis added).

> (2) DISCLOSURE TO ADOPTIVE PARENTS.—
>
> (a) At the time that an adoption entity is responsible for selecting prospective adoptive parents for a born or unborn child whose parents are seeking to place the child for adoption or whose rights were terminated pursuant to chapter 39, **the adoption entity must provide the prospective adoptive parents with information concerning the background of the child to the extent such information is disclosed to the adoption entity by the parents, legal custodian, or the department.** This subsection applies only if the adoption entity identifies the prospective adoptive parents and supervises the placement of the child in the

[1] "Adoption entity" is defined as "the department, a child-caring agency registered under s.409.176, an intermediary, a Florida child-placing agency licensed under s. 63.202, or a child-placing agency licensed in another state which is licensed by the department to place children in the State of Florida." Fla. Stat. § 63.032(3)(2017).

prospective adoptive parents' home. If any information cannot be disclosed because the records custodian failed or refused to produce the background information, the adoption entity has a duty to provide the information if it becomes available. An individual or entity contacted by an adoption entity to obtain the background information must release the requested information to the adoption entity without the necessity of a subpoena or a court order. **In all cases, the prospective adoptive parents must receive all available information by the date of the final hearing on the petition for adoption.** The information to be disclosed includes:

1. A family social and medical history form completed pursuant to s. 63.162(6).

2. The biological mother's medical records documenting her prenatal care and the birth and delivery of the child.

3. A complete set of the child's medical records documenting all medical treatment and care since the child's birth and before placement.

4. All mental health, psychological, and psychiatric records, reports, and evaluations concerning the child before placement.

5. The child's educational records, including all records concerning any special education needs of the child before placement.

6. Records documenting all incidents that required the department to provide services to the child, including all orders of adjudication of dependency or termination of parental rights issued pursuant to chapter 39, any case plans drafted to address the child's needs, all protective services investigations identifying the child as a victim, and all guardian ad litem reports filed with the court concerning the child.

7. Written information concerning the availability of adoption subsidies for the child, if applicable.

(b) When disclosing information pursuant to this subsection, the adoption entity must redact any confidential identifying information concerning the child's parents, foster parents and their families, siblings, relatives, and perpetrators of crimes against the child or involving the child.

(c) If the prospective adoptive parents waive the receipt of any of the records described in paragraph (a), a copy of the written notification of the waiver to the adoption entity shall be filed with the court.

Fla. Stat. § 63.085(2)(2017)(emphasis added). The statutes are very clear that all known background information on the child must be disclosed to prospective adoption parents by adoption

entities, such as CHILDNET. In fact, the specific types of documents listed by the statue are documents that are generally considered confidential pursuant to Chapter 39, Florida Statutes and the Health Insurance Portability and Accountability Act of 1996 ("HIPPA"); however, the Legislature has created a balance between maintaining confidentiality and providing prospective adoptive parents with full disclosure of the child's background by requiring that the substantive documents and information be provided to prospective adoptive parents, and only identifying information should be redacted. In this case, CHILDNET was responsible for disclosing in full any and all substantive information known or reasonably available concerning the background and behaviors of the prospective adoptive child (KM1) to the prospective adoptive parents (TM and MM).

Aside from CHILDNET's responsibility to provide full disclosure that comes from Chapter 63, Florida Statutes, CHILDNET's responsibility to disclose information regarding adoptive children comes from regulations in the Florida Administrative Code that governs child welfare agencies. For example, pursuant to Rule 65C-16.002:

> (7) Study of the Child. The case manager or adoption counselor must conduct a study of any child to be placed for adoption. In addition to aiding in identifying an adoptive placement, **the child study is also documentation of the child's special needs for subsidy purposes and serves as a vehicle for sharing the child's history with the adoptive family. The child study must include current and projected or future needs of the child based on all available information regarding the child and the birth family's medical and social history**. A study of the child shall include:
>
> (a) Developmental History. A developmental history must be obtained from the birth parents whenever possible. When the child has been in care for a period of time, developmental history obtained from birth parents must be supplemented by direct study and observation by the case manager or adoption counselor, foster parents, pediatrician, and if indicated, psychologist, teacher and other consultants. The developmental history must include:
>
> 1. Birth and health history,
> 2. Early development,
> **3. Child's characteristic way of responding to people,**

4. Deviations from the normal range of development; and,

5. Child's prior experiences, including continuity of care, separations, and information regarding other known significant relationships and placements the child has had prior to and since entering foster care. . . .

(c) Family History. Family history shall be obtained from birth parents when possible and shall include any medical and mental health information about both parents and any siblings. Information about the child's birth family shall include:

1. Age of both parents,
2. Race, national origin or ethnicity,
3. Religion,
4. Physical characteristics,
5. Educational achievements and occupations,
6. Health, medical history and possible hereditary problems,
7. Personality traits, special interests and abilities,
8. Child's past and present relationship with family members and the significance of these relationships; and,
9. **Actual or potential impact of past abuse, neglect or abandonment.**

(d) Psychological and Psychiatric Evaluations. **Psychological or psychiatric evaluations of children known or suspected of having mental health problems must be obtained prior to the adoption placement.** Any child who will be placed for adoption with medical subsidy for treatment of a psychological or psychiatric condition must have had such an evaluation within the 12 month period preceding the adoption placement. . . .

(8) A copy of the child study shall be provided to the adoptive parents prior to the adoptive placement. The identity of the birth family shall be protected when providing the child study to the family. . . .

F.A.C. 65C-16.002(7)-(8)(2016). CHILDNET has further responsibilities regarding adoption disclosures to prospective adoptive parents that originate from its contractual agreement with the Florida Department of Children and Families to administer foster care and related services and DCF Operating Procedures. *See* Pl.'s 1st Am. Compl. ¶ 10. Based on the foregoing, CHILDNET's argument that it has no liability for its failure to disclose information concerning child-on-child sexualized behaviors of KM1, or any other relevant background information concerning KM1, because such information is confidential is completely invalid and cannot be used as a basis to dismiss Count III.

CHILDNET's second argument to dismiss Count III is essentially that because TM and MM brought behavioral concerns to the attention of CHILDNET prior to finalizing their adoption of KM1, CHILDNET was absolved of its statutory, regulatory, and contractual obligations described above and instead, TM and MM became responsible for investigating such behaviors. CHILDNET, as the lead community-based care provider in Broward County, which directly provides foster care and related services, including case management and adoption services, is the child welfare expert and its employees are the child welfare professionals involved in the adoption of a foster child by lay prospective adoptive parents. TM and MM immediately brought their concerns about behaviors of KM1 to the attention of CHILDNET, including its Chief Operating Officer, Emilio Benitez, and every time were reassured by CHILDNET, who were the professionals and experts, that KM1's behaviors were normal and they had no need to be concerned. *See* Pl.'s 1st Am. Compl. ¶¶ 69, 73(a)-(f), 74, 75, 76, 77, 78, 80, 81, 93, 94, 116, 117. The negligent misrepresentation alleged by Plaintiffs TM and MM against CHILDNET is nearly identical to the negligent misrepresentation claims made by plaintiff adoptive parents in *Wallerstein v. Hosp. Corp. of America*. *See* 573 So. 2d 9 (Fla. 4th DCA 1990)(per curiam). In *Wallerstein*, plaintiff adoptive parents turned to professionals, specifically the physicians who attended the birth of the adoptive child, and alleged a cause of action for negligent misrepresentation against such physicians based on their assurances to the adoptive parents that the adoptive child was healthy and suitable for adoption. *Id.* at 10. The Fourth District Court of Appeal found the plaintiffs' "amended complaint alleged that the appellee doctors were employed 'to examine, recognize, and diagnose the healthy and physical condition of [the child] to recognize the child's suitability for adoption,' and that the appellee doctors assured them that the child was healthy and suitable for adoption." *Id.* The court reversed dismissal of the plaintiff adoptive

parents' negligent misrepresentation claims against the physicians finding they had been properly pled. *Id.*

CHILDNET relies upon *Butler v. Yusem* to place blame on Plaintiffs TM and MM and attempt to avoid liability; however, TM and MM are not to blame as they did what any reasonable prospective adoptive parents would do by bringing any concerning behaviors to the attention of the adoption entity and child welfare professionals they were working with and justifiably relied upon the reassurances and representations of such professionals. *Butler* deals with the element of "justifiable reliance" in a negligent misrepresentation claim and states:

> As to negligent misrepresentation claims, although justifiable reliance on the misrepresentation is required as an element of the claim, justifiable reliance on a representation is not the same thing as failure to exercise due diligence. One does not necessarily translate into the other." In fact, in *Gilchrist*, the Court held that principles of comparative negligence would apply to negligent misrepresentation claims. The [Florida Supreme] Court recognized that while a recipient of information will not have to investigate every piece of information furnished, he or she is responsible for "investigating information that a reasonable person in the position of the recipient would be expected to investigate." Thus, a recipient of an erroneous representation cannot "hide behind the unintentional negligence of the misrepresenter when the recipient is likewise negligent in failing to discover the error."

44 So. 3d 102, 105 (Fla. 2010)(per curiam)(quoting *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 336-37 (Fla. 1997)). The *Butler* case involved a dispute concerning a business partnership agreement to construct a commercial retail and office building and the defendant's failure to complete or lease the project as required by the agreement. *Butler*, 44 So. 3d at 103. Among other claims, the plaintiff alleged negligent misrepresentation on the part of defendants. *Id.* The Court reviewed the record and found that the plaintiff acted reasonably in asking questions to investigate the reputation of the defendants and could not be faulted for failing to ask the "right questions" to ascertain the information misrepresented to him. *Id.* at 106.

> [T]he trial court did not make its findings [that the plaintiff could not substantiate his negligent misrepresentation claim] based on the reasonable person standard, but instead found that [the plaintiff] did not exercise due diligence because he was a sophisticated business man and an experienced lawyer and although he undertook an investigation to verify the facts and the reputation of the defendants, he did not ask the "right questions" and thus did not obtain the information that was available if he had questioned the bank officer more thoroughly. Based on this record, the findings made by the trial court do not show that [the plaintiff] failed to establish all elements of his claims. . . .

Id. at 106. Similarly, TM and MM acted in accordance with the reasonable person standard by raising their concerns and questions to CHILDNET about KM1's behaviors, and CHILDNET's response and reassurances were justifiably relied upon by Plaintiffs.

CHILDNET also states in its Motion to Dismiss that "[p]rior to the adoption, TM and MM were provided the records, such as the judicial review and social study report, notifying them that KM1 was receiving in-home therapy; again putting them on notice prior to the adoption of KM1, of his need for therapy." This is not alleged anywhere in the First Amended Complaint and therefore, this argument goes beyond the four corners of the pleading and is inappropriate on a motion to dismiss. Even if the Court is to accept CHILDNET's representation that TM and MM had a copy of the judicial review and social study report prior to their adoption of KM1, based on the allegations in the First Amended Complaint, this document doesn't serve as a disclosure of all information known or reasonably available to CHILDNET. In fact, Plaintiffs have alleged that the document was incomplete on the part of CHILDNET:

> 48. On March 16, 2016, CHILDNET submitted a Judicial Review Social Study Report to the dependency court in preparation for a Judicial Review hearing on KM1's case. The purpose of both the report and the hearing was for CHILDNET, as the agency who had direct contact with KM1, to inform the court of any relevant facts or issues regarding KM1; **however, CHILDNET failed to inform the court of all of the serious behavior issues it was aware that KM1 had been experiencing**, which prohibited the dependency court from having complete information about KM1 to be able to make decisions that were in his best interest regarding his dependency case.

Pl.'s 1st Am. Compl. ¶¶ 48 (emphasis added). Further, there are many types of therapy children in foster care receive, the Judicial Review Social Study Reports referenced by CHILDNET did not inform or warn TM and MM that KM1 had a past history of sexualized behavior and behaviors that are indicative of sexual abuse by simply stating he received "therapy" services.

III. Plaintiffs TM and MM have sufficiently stated a claim for Wrongful Adoption based on Florida Statute Section 63.085 against CHILDNET; therefore, Count IV of Plaintiffs' First Amended Complaint should not be dismissed.

Count IV differs from Count III in that Count III is based on the representations made by CHILDNET and Plaintiffs TM and MM's reliance thereon, and in contrast, Count IV focuses on CHILDNET's negligence based on breach of its statutory duties concerning disclosures to prospective adoptive parents pursuant to section 63.085, Florida Statutes.

The Florida Supreme Court has "long held that to succeed on a claim of negligence, a plaintiff must establish the four elements of duty, breach, proximate causation, and damages." *Limones v. School Districts of Lee County*, 161 So. 3d 384, 389 (Fla. 2015).

> Florida law recognizes the following four sources of duty: (1) statutes or regulations; (2) common law interpretations of those statutes or regulations; (3) other sources in the common law; and (4) the general facts of the case. . . . The judicial determination of the existence of a duty is a ***minimal*** threshold that merely opens the courthouse doors. Once a court has concluded that a duty exists, Florida law neither requires nor allows the court to further expand its consideration into how a reasonably prudent person would or should act under the circumstances as a matter of law. We have clearly stated that the remaining elements of negligence – breach, proximate causation, and damages – are to be resolved by the fact-finder.

Id. at 389 (internal citations omitted); *see also Clay Electric Co-op, Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003); *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 503 n.2 (Fla. 1992). Count IV is based on CHILDNET's duties arising from the Florida Statutes. The Chapter 63 statutory duties of adoption entities, such as CHILDNET, specifically exist for the protection of prospective adoptive parents, such as TM and MM:

> 63.039 Duty of adoption entity to prospective adoptive parents; sanctions.—

(1) **An adoption entity placing a minor for adoption has an affirmative duty to follow the requirements of this chapter and specifically the following provisions, which protect and promote the well-being of persons being adopted and their parents and prospective adoptive parents by promoting certainty, finality, and permanency for such persons**. The adoption entity must:

(a) Provide written initial disclosure to the prospective adoptive parent at the time and in the manner required under s. 63.085. . .

Fla. Stat. § 63.039(1)(a)-(b)(2017)(emphasis added); *see also* Fla. Stat. § 63.085 (2017)(quoted in full hereinabove).

Plaintiffs TM and MM allege the following in Count IV of their First Amended Complaint:

120. Defendant, CHILDNET owed a statutory duty pursuant to section 63.085, Florida Statutes, to TM and MM, to provide TM and MM with all available information concerning KM1's background prior to finalizing the adoption of KM1 by TM and MM.

121. Defendant, CHILDNET breached the above statutory duty in the following ways:

a. CHILDNET failed to disclose all known behaviors and all known history regarding KM1 to TM and MM prior to placing KM1 in their home and prior to finalizing the adoption of KM1 by TM and MM;

b. Although CHILDNET was aware that KM1 had many concerning behaviors during his time in foster care that were signs that he may have been sexually abused, CHILDNET failed to obtain a psychosexual evaluation of KM1 prior to placing KM1 in TM and MM's home and prior to finalizing the adoption of KM1 by TM and MM.;

c. Although CHILDNET was aware that KM1 had many concerning behaviors during his time in foster care that were signs that he may have mental health problems, CHILDNET failed to obtain a psychological evaluation prior to placing KM1 in TM and MM's home and prior to finalizing the adoption of KM1 by TM and MM.;

d. Upon TM and MM raising concerns regarding KM1's behaviors in their home and whether he was receiving appropriate therapeutic services to address his behaviors, CHILDNET failed to obtain appropriate therapeutic services for KM1 and misleadingly reassured TM and MM that KM1's behavior was normal and they should not be worried about him; and

e. Prior to their adoption of KM1, CHILDNET provided TM and MM with a misleading Child Study of KM1 that misrepresented his history of concerning behaviors by stating that he had no maladaptive behaviors, when, in fact, CHILDNET was well aware of many maladaptive behaviors exhibited by KM1 during his time in foster care.

Pl.'s 1st Am. Compl. ¶¶ 120-121. Plaintiffs further allege that as a result and proximate cause of CHILDNET's violation of section 63.085, Florida Statutes, they have suffered injuries and monetary damages. Pl.'s 1st Am. Compl. ¶ 122. Plaintiffs have adequately stated a cause of action for negligence based on CHILDNET's duties arising from and violation of section 63.085, Florida Statutes in their First Amended Complaint and Count IV should not be dismissed.

IV. Plaintiffs KM1, KM2, TM, and MM have sufficiently stated a claim for Culpable Negligence against CHILDNET; therefore, Count V of Plaintiffs' First Amended Complaint should not be dismissed.

Plaintiffs' First Amended Complaint, alleges, at all times material hereto, Defendant CHILDNET was the Community Based Care lead agency in Broward County, Florida which contracted with the DCF to administer foster care and related services pursuant to section 409.993, Florida Statutes. Pl.'s 1st Am. Compl., ¶ 10. Section 409.993 governs tort actions against private, Community Based Care lead agencies, such as Defendant CHILDNET, and provides for increased rights of recovery (beyond the limitations for economic and noneconomic damages stated in the statutes) in actions where such agencies act in a "culpably negligent manner or with willful and wanton disregard . . . if such acts result in injury or death or such acts proximately cause such injury or death." Fla. Stat. § 409.993(2)(b)(2017).[2] These very statutes, which governed Defendant CHILDNET as the lead community-based care provider during the time CHILDNET provided

[2] Section 409.1671, Florida Statutes, "Foster care and related services; outsourcing," was repealed and replaced by section 409.993, Florida Statutes, "Lead agencies and subcontractor liability" on or about July 1, 2014. Although section 409.1671 does not apply to the case at hand, it is referenced here because CHILDNET cites to it in its Motion to Dismiss.

services to Plaintiffs, go on to define "culpably negligent manner" to mean "reckless indifference **or** grossly careless disregard of human life." *Id.* (emphasis supplied).

The statute applicable here provides a clear definition for culpable negligence – either "reckless indifference or grossly careless disregard of human life." Fla. Stat. § Fla. Stat. § 409.993(2)(b)(2017); *see Vocelle v. Knight Bros. Paper Co.* 118 So.2d 664 (Fla. 1st DCA)(holding that when a definition of a word or phrase is provided in a statute, that meaning must be ascribed to the word or phrase whenever it is repeated in the statute unless a contrary intent appears and the court has no power to go outside the statute to give a different meaning to words used in the statute); *see also Daniels v. Florida Dep't of Health*, 989 So. 2d 61 (Fla 2005)(recognizing that when a statute is clear and unambiguous, the statute's plain and ordinary meaning must control and courts must read the statute as written).

Persuasive federal case law construes the provisions of section 409.993, Florida Statutes and the types of behavior that constitute culpable negligence pursuant to that statute. Such case law should be used to analyze whether Plaintiffs have adequately pled that CHILDNET acted in a culpably negligent manner and it is not necessary to look to criminal manslaughter, civil punitive damages claims, or worker's compensation claims. *S.K. v. Lutheran Servs. Fla., Inc.*, 2018 WL 2100122 (M.D. Fla. 2018).

In a case before the United States District Court for the Middle District of Florida, wherein the Plaintiff alleged claims against a lead community-based care provider and its subcontracted community-based care provider for negligence, culpable negligence, and violations of 42 U.S.C. § 1983, the defendants moved to dismiss the plaintiff's culpable negligence claims also using the criminal law definition for "culpable negligence." *Id.* In regard to such argument, the court stated:

> Defendant defines "culpable negligence" from the criminal law context as "consciously doing an act or following a course of conduct that defendant must

> have known, or reasonably should have known, was likely to cause death or great bodily injury." (Doc. #27, p. 5, citing Logan v. State, 592 So. 2d 295, 298 (Fla. 5th DCA 1991)). The more applicable definition comes from the relevant statutes, which define "culpable negligence" as "reckless indifference or grossly careless disregard of human life." Fla. Stat. §§ 409.1671(1)(k); 409.993(3)(b).

Id.

The court found the definition in section 409.993, Florida Statutes to be "similar to the allegations required for deliberate indifference," which was the standard for the plaintiff's claims that the defendant had violated the plaintiff's civil rights under 42 U.S.C. § 1983. *Id.* "Deliberate indifference is not the same thing as negligence or carelessness." *Id.* (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). "In order to establish deliberate indifference, plaintiffs must allege (and prove at trial) that the defendant: (1) was objectively aware of a risk of serious harm; (2) recklessly disregarded the risk of harm; and (3) this conduct was more than merely negligent." *Id.* (citing to *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999)).

Further, in becoming the primary opinion to apply section 42 U.S.C. § 1983 Civil Rights actions to children in foster care, the Eleventh Circuit in *Taylor v. Ledbetter* relied upon the prior Second Circuit case of *Doe v. New York City Department of Social Services*. *See Taylor*, 818 F.2d 791, 793, 795-796 (11th Cir. 1987)(citing *Doe*, 649 F.2d 134 (2d Cir. 1981)). According to *Doe*, "repeated acts of negligence could be evidence of indifference." *Doe*, 649 F.2d at 142. Therefore, while Plaintiffs disagree with CHILDNET's argument that they have merely stacked allegations of grossly negligent acts on the part of CHILDNET to substantiate a claim for culpable negligence in Count V, such repetitive acts can be used to meet the deliberate indifference standard in a federal civil rights claim, and likewise should substantiate a culpable negligence claim at the state level.

Plaintiffs' claims for culpable negligence against Defendant CHILDNET are asserted as follows, in pertinent part:

124. Defendant, CHILDNET owed the following statutory duties pursuant to section 409.993, Florida Statutes, to Plaintiffs, KM1, KM2, TM, and MM:

f. To not act in a culpably negligent manner while performing foster care and related services and adoption services to the Plaintiffs;
g. To not act with reckless indifference of human life while performing foster care and related services and adoption services to the Plaintiffs; and
h. To not act with grossly careless disregard of human life while performing foster care and related services and adoption services to the Plaintiffs.

125. Defendant, CHILDNET breached the above statutory duties and acted in a culpably negligent manner, with reckless indifference or grossly careless disregard for human life, in the following ways:

a. Despite having repeated knowledge that KM1 had engaged in behavior consistent with child-on-child sexual activity with his foster brother in the Ebanks foster home, CHILDNET failed:

i. To call the Florida Abuse Hotline so that an investigation could be initiated, as required pursuant to Florida law;
ii. To implement any sort of safety plan in TM and MM's home to protect KM2 and prevent KM1 and KM2 from engaging in child-on-child sexual activity;
iii. To refer KM1 to any sort of psychological evaluation or psychosexual evaluation to understand his needs; and
iv. To refer KM1 to any sort of counseling that was specialized to deal with suspected sexual abuse of KM1;

b. CHILDNET recklessly and knowingly misrepresented material facts to TM and MM that KM1's sexualized behaviors were normal for a foster child;

c. After the CEO of CHILDNET, Emilio Benitez, was informed by TM and MM of KM1's inappropriate behavior with his foster brother, he did nothing to ensure that his staff followed proper protocol, including contacting the Florida Abuse Hotline, implementing appropriate safety plans, obtaining therapeutic services, or obtaining psychological or psychosexual evaluations, and instead represented to TM and MM that he was not concerned with KM1's behaviors when he was aware that KM1 would be residing with TM and MM's young daughter, KM2, thereby placing KM1 and KM2 at risk of harm;

d. CHILDNET's upper management allowed for internal procedures of transferring KM1's case, and the cases of other dependent children, to

different units within CHILDNET whenever the case plan goal changed, thereby assigning a brand-new Child Advocate to the case anytime the goal changed, which placed such children at risk of harm as it failed to ensure that dependent children, such as KM1, had a Child Advocate who was knowledgeable of his behaviors and history;

e. CHILDNET's upper management's allowance of the internal procedure to transfer the cases of dependent children to different units whenever the case plan goal changed also put prospective adoptive parents and their families, such as TM, MM, and KM2, at risk of harm because without an Adoption Advocate having full knowledge of a prospective adoptive child's history and behaviors, such child cannot be appropriately and safely matched with an adoptive family;

f. CHILDNET's upper management implemented a practice where its Child Advocates carried caseloads that were reckless, dangerous, and double the national standard for child welfare, thereby requiring Child Advocates to do double the work in half the time required to do the work, thereby placing the children on their caseloads, such as KM1, at risk of harm;

g. CHILDNET's upper management's allowance of the practice of its Child Advocates to carry caseloads that were reckless, dangerous, and double the national standard for child welfare also placed prospective adoptive parents and their families, such as TM, MM, and KM2, at risk of harm as the workload did not allow CHILDNET Adoption Advocates to be able to obtain full knowledge of the adoptive child or the prospective adoptive families to be able to make appropriate, safe matches and to be able to fully disclose all available information about the adoptive child to the prospective adoptive family.

Pl.'s 1st Am. Compl. ¶¶ 124-125. Based on the foregoing, Plaintiffs have sufficiently alleged that Defendant CHILDNET was culpably negligent because Plaintiffs have pled repeated acts of negligence or carelessness, a pattern of grossly careless disregard, reckless indifference, and/or willful and wanton conduct on the part of CHILDNET which amount to culpable negligence.

CHILDNET cites to a slew of cases pertaining to criminal culpable negligence and punitive damages, arguing that Plaintiffs' claim for culpable negligence is akin to manslaughter. This simply is not true. As section 409.993 expressly defines "culpably negligent manner" to mean

"reckless indifference or grossly careless disregard of human life," CHILDNET's reliance on criminal and punitive damages cases is misplaced.

Further, Plaintiffs are not seeking punitive damages and this is not a criminal action. Rather, with respect to Plaintiffs' culpable negligence claim, the caps and limitations of section 409.993, Florida Statutes are inapplicable to the Plaintiffs' damages and they are seeking compensatory damages in excess of the statutory cap. Manslaughter and punitive damage claims both have the common purpose of punishment for the wrong of the offender or tortfeasor. In contrast, section 409.993 serves to hold community-based care agencies responsible for compensatory damages beyond the statutory limitations of section 409.993, which only apply in ordinary negligence claims, when the conduct of such agencies rises to the "culpably negligent manner" standard. The applicable subsections of 409.993 state:

> In a tort action brought against such a lead agency or employee, net economic damages shall be limited to $2 million per liability claim . . . In any tort action brought against a lead agency, noneconomic damages shall be limited to $400,000 per claim. . . . . Such immunities are not applicable to a lead agency or an employee who acts in a culpably negligent manner or with willful and wanton disregard or unprovoked physical aggression if such acts result in injury or death or such acts proximately cause such injury or death.

Fla. Stat. § 409.993(2)(a)-(b); *see also* Fla. Stat. § 409.993(1)(a)("The Legislature finds that the state has traditionally provided foster care services to children who are the responsibility of the state. As such, foster children have not had the right to recover for injuries beyond the limitations specified in s. 768.28.").

In *Russ v. State*, cited by CHILDNET, the Florida Supreme Court determined "that the degree of negligence required to sustain imprisonment [for manslaughter] should be at least as high as that required for the imposition of punitive damages in a civil action." 191 So. 296, 298 (Fla. 1939).

> There is a real affinity between the character (or kind or degree) of negligence necessary to recover punitive damages or to sustain or warrant a conviction of manslaughter. Both have, as a basic purpose, the punishment of the offender. The offender in a manslaughter action may be deprived of his liberty or property by the State while the offender in an action for that kind of negligence justifying the imposition of punitive damages is deprived of his property – not as compensation to the injured party but as punishment – ergo, both are punishment and partake of public wrongs, to a greater or less degree. On the other hand, actions under the guest statute relate to purely private wrongs where the objective is to require the wrongdoer to compensate the injured party for the actual damages he sustains. . . .

Carraway v. Revell, 116 So. 2d 16, 20 (Fla. 1959).

CHILDNET's reliance on civil cases addressing the imposition of punitive damages and criminal cases assessing the culpable negligence standard in the context of criminal liability is problematic, particularly because culpable negligence as defined by section 409.993, Florida Statutes does not import an "intentional, conscious" standard into its definition.

Further, the cases upon which Defendant CHILDNET relies do not involve the protracted misconduct and egregious misrepresentations that were present in this case. For example, in *White Construction Co., Inc v. Dupont*, a loader truck with brakes that "had not been working for some time" accidentally backed into the plaintiff's trailer, forcing the trailer to advance and roll over the plaintiff. 455 So.2d 1026 (Fla. 1984)(receded from on other grounds). In *Jeep Corporation v. Walker,* the defendant continued to market a vehicle with a high propensity to roll over without warning consumers; because defendant's conduct did not evince a deliberate attempt to injure, it fell short of the standard for punitive damages. 528 So.2d 1203 (Fla. 4th DCA 1988).

In contrast, the caselaw cited by CHILDNET showing instances were the culpable negligence standard of punitive damages were met are similar to the facts alleged by Plaintiffs in their First Amended Complaint. Plaintiffs have made numerous allegations to show that CHILDNET misrepresented and concealed information concerning KM1 to induce TM and MM to adopt KM1, which in turn exposed KM1 and KM2 to a substantial risk of serious harm.

Likewise, in *CSX Transp. Inc. v. Palank*, cited by defendant, a jury awarded punitive damages in the amount of $50 million where the defendant had actual knowledge of a defective railroad crosspin, failed to properly inspect the defective switch, and proactively used the switch anyway causing a train to derail and inflict injuries to the plaintiff. *See* 743 So. 2d 556 (Fla. 4th DCA 1999). As Plaintiffs TM and MM in this case allege they were provided with a Child Study for KM1 that falsely stated he had no maladaptive behaviors, the defendants in *CSX* similarly filed false reports stating proper safety inspections had been performed of the defective switch. *Id.* CHILDNET also relies upon *Phillip Morris USA Inc. v. Cohen* and *Phillip Morris USA, Inc. v. Naugle*, wherein defendant Phillip Morris was subject to millions of dollars in punitive damages for misrepresenting the dangers of addiction and impacts on health caused by smoking and concealing the true nature of cigarettes. *See* 2012 WL 3964705 (Fla. 4th DCA Sept. 12, 2012) and 2012 WL 2361748 (Fla. 4th DCA Jun. 22, 2012). Similarly, in this case, CHILDNET concealed and misrepresented information regarding KM1 and his concerning behaviors, of which CHILDNET had actual knowledge, from TM and MM to induce adoption of KM1.

V. Conclusion

Plaintiffs have adequately pled their claims against CHILDNET for Wrongful Adoption based on Negligent Misrepresentation and Concealment (Count III), Wrongful Adoption based on Section 63.085, Florida Statutes (Count IV), and Culpable Negligence (Count V). Whether CHILDNET is liable for the claims alleged by Plaintiffs should be left to the jury to determine and CHILDNET's Motion to Dismiss Counts III, IV, and V of Plaintiffs' First Amended Complaint should be denied.

WHEREFORE, the Plaintiff respectfully requests this Honorable Court deny Defendant CHILDNET, Inc.'s Motion to Defendant Motion to Dismiss Counts III, IV, and V of Plaintiffs'

First Amended Complaint for the reasons and upon the authority stated herein, to require CHILDNET to file an Answer to Counts III, IV, and V of Plaintiffs' First Amended Complaint within twenty (20) days, and for any further relief the Court deems just and proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 2nd day of June 2019, a true and correct copy of the above and foregoing was served via the E-Portal on:

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